No. 78-1492

FILED
JUN 1 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

BERNARD GUTTMAN t/a LIBERTY NURSING CENTER,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

JOHN S. IRVING
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID S. FISHBACK
Attorney
National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1492

BERNARD GUTTMAN t/a LIBERTY NURSING CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 19-20) is reported at 591 F. 2d 1335. The decision and order of the National Labor Relations Board (Pet. App. 21-34) are reported at 235 N.L.R.B. No. 179. The decision and certification of representative (Pet. App. 35-36) and the report and recommendations on objections to election (Pet. App. 37-44) in the related representation case are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19-20) was entered on January 15, 1979. A petition for

rehearing was denied by the court of appeals on April 30, 1979 (App., *infra*, 1a-2a). The petition for a writ of certiorari was filed on March 29, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly rejected petitioner's objections to a representation election without conducting an evidentiary hearing.

STATUTE AND REGULATION INVOLVED

1. The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 45-47.

2. 29 C.F.R. 102.69(d) (1978) provides in part:

> The action of the regional director in issuing a report on objections or challenged ballots, or both, * * * may be the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which, in the exercise of his reasonable discretion, he determines may more appropriately be resolved after a hearing, he shall issue and cause to be served on the parties a notice of hearing * * *.

STATEMENT

1. Pursuant to a representation petition filed by Professional Health Care Division, Retail Clerks Local 1361, Retail Clerks International Association, AFL-CIO ("the Union"), the Board's Regional Director conducted an election among petitioner's employees on June 10, 1977. The Union prevailed in this election by a vote of 59 to 44 (Pet. App. 37). Petitioner filed timely objections to the election alleging, *inter alia*,

that two employee supporters of the Union engaged in improper conduct in the polling area; that the Union, through its representatives and employees acting on its behalf, threatened that employees would lose their jobs if they did not vote for the Union; and that the Union misrepresented petitioner's financial condition to the employees (Pet. App. 38).

a. In support of the objection concerning improper conduct in the polling area, petitioner submitted affidavits alleging that, after employees Mary Frey and Lewis Calcasacco voted, they stood in line and spoke with other employees waiting to vote. While the affidavits did not indicate the content of these conversations, the Regional Director's investigation revealed that Frey engaged in a social conversation with a friend waiting to vote, and that Calcasacco asked a fellow employee to vote for the Union. Neither petitioner's affidavits nor the Regional Director's investigation revealed any evidence to indicate that either Frey or Calcasacco had any authority to act on the Union's behalf (Pet. App. 39).

b. Regarding the alleged threats of job loss, petitioner submitted affidavits from employees stating: (1) that, in the course of campaigning, a union representative suggested to one affiant that petitioner could replace him with a younger man (Pet. App. 40); (2) that a union representative told another affiant that, if there were a strike, those who did not support the Union would lose their jobs; (3) that a third affiant received a telephone call from an unnamed person identifying himself only as a union representative and warning that she might lose her job if she did not vote for the Union—to which the affiant responded that she was not frightened because only her employer could fire her; (4) that, an hour after

receiving a call from Union representative Ray Stubblefield, an affiant received another call—this one anonymous—in which the caller stated that he would see to it that she would lose her job if she did not vote for the Union; and (5) that Stubblefield told a fifth affiant that those who voted against the Union would lose their jobs (Pet. App. 41).

c. Petitioner also presented evidence that, about a week before the election, the Union stated that petitioner could afford to pay higher wages because he owned profitable nursing homes in New Jersey and Florida. Upon learning about these statements, petitioner told his informant that he was losing money on the nursing home he owned in New Jersey and that he had closed the Florida home two years earlier (Pet. App. 43).

2. After conducting an investigation, the Regional Director found that, even assuming the truth of the statements contained in petitioner's affidavits, there was nothing to warrant invalidation of the election (Pet. App. 37-44).

a. The Director noted that, although last-minute electioneering by parties or their representatives at polling places is prohibited (*Michem, Inc.*, 170 N.L.R.B. 362 (1968)), there was no evidence in this case that either Frey or Calcasacco had authority to act on behalf of the Union (Pet. App. 39-40).

b. The Director stated that the alleged threats of job loss either "could not reasonably be construed to coerce employees in the exercise of their free choice in the election" or contained nothing suggesting the Union's responsibility (Pet. App. 42). With regard to the threats attributed to Union representative Stubblefield, the Director noted that "[n]either employee had reason to believe that the Union, in a

secret ballot election, could ascertain how she voted," nor have "reason to believe that the Employer favored the Union and on request was disposed to discharge any employee who voted *against* the Union" (*id.* at 42-43; emphasis in original). The Director also noted that the alleged Stubblefield threats "were made to only two employees in a unit of 109 employees and were not alleged to have been communicated to others in the voting group" (*id.* at 43).

c. Finally, the Director explained that, even if petitioner's allegations concerning Union misrepresentation of petitioner's business ventures were true, they were insubstantial because (*id.* at 44)

> the financial condition of the Employer's other facilities was not a matter with regard to which the employees would expect the Union to have authoritative knowledge of the true facts. In any event, the Employer had sufficient time to reply to the Union's statements. Thus, these statements are not material misrepresentations which would warrant setting aside the election either under the Board's recently overruled *Hollywood Ceramics* [140 N.L.R.B. 221 (1962)] rule or its [then] current *Shopping Kart* [228 N.L.R.B. 1311 (1977)] holding.

The Director therefore rejected petitioner's objections and recommended that the Union be certified as the employees' bargaining agent (Pet. App. 44).

3. The Board, after consideration of petitioner's objections, adopted the Director's findings and recommendations (Pet. App. 35-36). Petitioner thereafter refused to bargain with the Union, which the Board held to be in violation of Section 8(a)(5) and (1) of the Act. The Board entered a bargaining order (Pet. App. 21-34), which was enforced by the court of appeals (Pet. App. 19-20).

ARGUMENT

Petitioner contends (Pet. 9-17) that he was entitled to an evidentiary hearing on the objections to the representation election. Although the National Labor Relations Act does not provide for post-election hearings to resolve challenges or objections to an election, the Board has adopted regulations providing that an evidentiary hearing may be ordered when an administrative investigation reveals that "substantial and material factual issues exist." 29 C.F.R. 102.69(d) (1978). The sole issue raised in the petition (Pet. 9) is whether the Board properly concluded that a hearing was not required because petitioner's objections did not raise "substantial and material factual issues." The Board's resolution of this issue was based on its evaluation of the particular facts of this case. The analysis of the Board was upheld by the court of appeals and further review of this essentially factual issue is unwarranted.[1]

In any event, for the reasons discussed in the Director's Report (see pages 4-5, *supra*), there were no material issues of fact that required a hearing in this case. Even accepting the allegations in petitioner's affidavits as truthful, they were insufficient as a matter

[1]Petitioner urges (Pet. 10) that the Board regulation should be interpreted to require an evidentiary hearing where there is a "genuine issue as to any material fact," as under Rule 56 of the Federal Rules of Civil Procedure. We agree that this is a proper interpretation of the regulation (see cases cited Pet. 9). The issue here is simply whether petitioner's objections presented any genuine issues of material fact.

of law to invalidate the election.[2] There was, accordingly, no need for any further hearing on these claims.

[2]Petitioner contends (Pet. 12) that the fact that an employee urged support for the Union at the polling place "in and of itself" establishes a prima facie case that the employee was acting for the Union. The cases relied on by petitioner (Pet. 12-13) do not support this proposition. In *NLRB* v. *Georgetown Dress Corp.*, 537 F. 2d 1239, 1241, 1244 (4th Cir. 1976), mebers of the union's In-Plant-Organizing Committee engaged in electioneering in the polling area, and, in *Beaird-Poulan Division* v. *NLRB*, 571 F. 2d 432, 434 (8th Cir. 1978), five employees wearing "Union T-shirts" sat in the polling area after they voted (Poulan Br. App. 13-14, 64-72). Thus, in both cases, the evidence indicated that the employees had a significant association with the organizing unions. Similarly, in *Fidelity Telephone Co.* v. *NLRB*, 574 F. 2d 409, 410-411 (8th Cir. 1978), the employee involved had engaged in substantial activity on behalf of the union.

Petitioner asserts (Pet. 14-15) that the conclusion in this case that the alleged job-loss threats did not impermissibly restrain employee free choice is inconsistent with *Seamprufe, Inc.*, 82 N.L.R.B. 892 (1949), and *NLRB* v. *Southern Paper Box Co.*, 473 F. 2d 208 (8th Cir. 1973). Those cases differ markedly from the present case, however, for they both involved threats of retaliation made by union supporters and representatives if employees did not demonstrate support for the union *prior* to the election.

Petitioner is also mistaken in its contention (Pet. 15-16) that the Board's conclusion in this case that misrepresentations of petitioner's financial status were harmless conflicts with *NLRB* v. *Southern Paper Box Co.*, *supra*. In *Southern Paper Box*, the court found that the company had no time to respond to union allegations of financial misconduct, 473 F. 2d at 211; here, by contrast, the Board found the time for reply to be ample (Pet. App. 44). *Alson Mfg.* v. *NLRB*, 523 F. 2d 470 (9th Cir. 1975), on which petitioner relies (Pet. 15), is also inapposite. That case involved a complex set of false allegations of employer dishonesty and widespread threats of violence. Finally, as the court of appeals noted in denying the petition for rehearing (App., *infra*, 2a), "the insufficiency of petitioner's allegations distinguishes the present case from *Prestolite Wire Div.* v. *NLRB*, * * * 100 LRRM 2503 (6th Cir. 1979)."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN S. IRVING
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID S. FISHBACK
Attorney
National Labor Relations Board

MAY 1979

DOJ-1979-05

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1571

BERNARD GUTTMAN, t/a LIBERTY MUTUAL NURSING CENTER,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

RETAIL CLERKS LOCAL 1361, CHARTERED BY RETAIL CLERKS INTERNATIONAL UNION, AFL-CIO,

Intervenor

(Board No. 4-CA-8989, 235 NLRB No. 179)

PRESENT: SEITZ, *Chief Judge;* GIBBONS and HIGGINBOTHAM, *Circuit Judges.*

ORDER DENYING PETITION FOR PANEL REHEARING

The Court, having read the petition for panel rehearing and the requested answer, concludes (1) that the Regional Director assumed in his report that each of petitioner's objections was true, but found each insufficient to warrant setting aside the election under either *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. No. 190, or *Hollywood Ceramics Co., Inc.*, 140

N.L.R.B. 221; (2) that the insufficiency of petitioner's allegations distinguishes the present case from *Prestolite Wire Div. v. NLRB*,—F. 2d—, 100 LRRM 2503 (6th Cir. 1979); and (3) that the Regional Director's failure to transmit the full record to the Board pursuant to 29 C.F.R. §102.69(g) does not merit denial of the Board's petition to enforce its order in this case. It is therefore

ORDERED that the petition for panel rehearing be and hereby is denied.

By the Court,

/s/ Seitz

SEITZ
Chief Judge

DATED: April 30, 1979